FILED
FEB 23 1957
JOHN T. FEY, Clerk

No. 801

In The Supreme Court of the United States

AERO DESIGN & ENGINEERING CO. ET AL.,
Appellants,

VERSUS

OKLAHOMA EMPLOYMENT SECURITY COMMISSION, ET AL.,
Appellees.

STATEMENT AS TO JURISDICTION

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FEBRUARY, 1957.

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In The
Supreme Court of the United States

AERO DESIGN & ENGINEERING CO., a Corporation; AMERICAN IRON & MACHINE WORKS COMPANY, INC., a Corporation; ROBBERSON STEEL COMPANY, a Corporation; CAPITOL STEEL & IRON COMPANY, a Corporation; CAPITOL HILL TAXI OPERATING COMPANY, a Corporation; and ASSOCIATED INDUSTRIES OF OKLAHOMA, individually and on behalf of the class of persons similarly situated.

Appellants,

VERSUS

OKLAHOMA EMPLOYMENT SECURITY COMMISSION and DAVE VANDIVIER, HUGH L. HARRELL, T. C. "TED" KNOOP, E. R. BURNS and TOM CHESHER, the members thereof; BRUTON WOOD, the Executive Director thereof; MARK NEUMANN, the Chief of Benefits thereof; and JACK D. ABRAHAM and 256 others similarly situated.

Appellees.

STATEMENT AS TO JURISDICTION

In compliance with rules 13 and 15 the appellants submit herewith their statement as to the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment entered in this cause by the United States District Court for the Western District of Oklahoma.

I.

OPINION BELOW

The opinion of the District Court is appended hereto. It has not yet been reported. No separate findings of fact and conclusions of law were made.

II.

JURISDICTION

This action was brought in the United States District Court for the Western District of Oklahoma to enjoin the Oklahoma Employment Security Commission, an agency of the State of Oklahoma, from disbursing about $25,000.00 for unemployment compensation benefits. Federal jurisdiction is based upon 28 U. S. C. § 1331, as the sum in controversy exceeds $3,000 and the right to injunctive relief arises under the due process of law clause of the 14th Amendment to the Constitution of the United States. The specific constitutional point is that a "double affirmation clause" contained in the Oklahoma Employment Security Act deprives the appellant employers of due process of law insofar as it purports to direct the disbursement of unemployment benefits prior to a final determination as to the lawfulness of such disbursement. Said employers' standing to maintain the action exists two-fold: (1) in Oklahoma taxpayers can sue to enjoin the improper disbursement of public funds and (2) as contributors to the Oklahoma Unemploy-

ment Compensation Fund they have a property right therein. A three-judge court was convened under 28 U. S. C. § § 2281, 2284.

The judgment of the District Court was dated and entered December 28, 1956. The Notice of Appeal to the Supreme Court of the United States was filed January 4, 1957, in the office of the Clerk of the United States District Court for the Western District of Oklahoma.

Jurisdiction of this appeal is conferred upon the Supreme Court of the United States by 28 U. S. C. § 1253.

The following cases sustain the jurisdiction of this Court:

St. John v. *Wisconsin Employment Relations Board*, 340 U. S. 411, 95 L. Ed. 386, 71 S. Ct. 375;

Radio Corporation of America v. *United States*, 341 U. S. 412, 95 L. Ed. 1062, 71 S. Ct. 806.

This appeal involves the validity of a portion of the Oklahoma Employment Security Act[1]. That Act provides a program of unemployment compensation "for the benefit of persons unemployed through no fault of their own"[2]. It establishes eligibility requirements for

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[1]40 Okl. Stat. § 211 et seq.

[2]Declaration of public policy, 40 Okl. Stat. § 212, as amended in 1953.

claimants[3] and certain disqualifications[4]. Procedurally it provides for the filing and processing of claims[5]. A claim is first determined by a representative of the Commission[6], whose decision is appealable to the Appeal Tribunal, which consists of a "referee"[7]. In "labor dispute" cases the initial hearing is before the Appeal Tribunal[8]. In either event an appeal lies from the Appeal Tribunal to a Board of Review[9]. After these administrative steps there is a right to "judicial review" by the District Court[10]. Unemployment benefits are paid from the Oklahoma Unemployment Compensation Fund[11], which is maintained by "contributions" paid by the employers of the state[12]. An employer's contribution rate is determined by a table[13], and is affected by his own "benefit wage

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[3]40 Okl. Stat. § 214.
[4]40 Okl. Stat. § 215.
[5]40 Okl. Stat. § 216.
[6]40 Okl. Stat. § 216 (c).
[7]40 Okl. Stat. § 216 (d) (1) and (2).
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[9]40 Okl. Stat. § 216 (d) (3); 40 Okl. Stat. § 220 (c).
[10]40 Okl. Stat. § 216 (d) (7).
[11]40 Okl. Stat. § 219.
[12]40 Okl. Stat. § 217.
[13]40 Okl. Stat. § 217 (c) (6).

ratio"[14] as well as the "state experience factor"[15].

The particular portion of the Act under attack here is 40 Okl. Stat. Supp. 1955, § 216(e), the "double affirmation clause". It appears at page 316 of the 1955 Supplement to Oklahoma Statutes. It provides (the objectionable portion being italicized):

> "PAYMENT OF BENEFITS. Benefits shall be promptly paid on any claim in accordance with a determination or redetermination, unless a party files an appeal with an appeal tribunal as provided in this Section. If pursuant to a determination or redetermination benefits are payable in any amount as to which there is no dispute, or with respect to unemployment following the maximum disqualification period that may be imposed because of an alleged factor sur-

[14]In computing an employer's benefit wage ratio, two items are used: (1) the total of the benefit wages charged against his account during the three preceding calendar years, and (2) the total of his taxable payrolls for those same three years. The Commission divides the total taxable payrolls into the total benefit wages and the percentage figure thus obtained is the employer's benefit wage ratio. 40 Okl. Stat. § 217 (c) (4). The term "benefit wages" refers to the wages received by a claimant from the employer during a twelve months period preceding the filing of his claim. They are "treated * * * as though they had been paid in the calendar year in which such benefits are paid". Thus an employer's account is not charged for the amount of benefits paid to a claimant, but for the amount of wages which he paid the claimant during employment. 40 Okl. Stat. § 217 (c) (2). An "employer's benefit wages" is the total of all benefit wages for former employees who receive benefits during the year. 40 Okl. Stat. § 217 (c) (3).

[15]In computing the state experience factor, two items are used: (1) benefit wages for the entire state, and (2) actual benefits paid for the entire state. The Commission takes the total of the benefit wages charged against all employers for the three preceding calendar years and divides them into the total benefits paid during the same three years. The percentage figure thus obtained becomes the state experience factor. 40 Okl. Stat. § 217 (c) (5).

rounding the separation from work, such amount of benefits shall be promptly paid regardless of any appeal. The commencement of a proceeding for judicial review pursuant to Section 216(d) of this Title shall not operate as a supersedeas or stay unless the Board of Review shall so order and the filing of a petition for judicial review by the Commission from a decision of the Board of Review which allowed benefits shall not authorize the board or any court to direct the denial of any benefits which would have been payable under the Board of Review's decision. *If a determination allowing benefits is affirmed in any amount by an appeal tribunal or is so affirmed by the Board of Review, or if a decision of an appeal tribunal allowing benefits is affirmed in any amount by the Board of Review, such benefits shall be promptly paid regardless of any further appeal, and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by the Board or any court* but if such decision is finally reversed no employer's account shall be charged with benefits as paid pursuant to the erroneous determination and benefits shall not be paid for any subsequent weeks of unemployment involved in such reversal. Provided, however, that if the Commission determines that an individual is ineligible by reason of Section 214(f) of this Title no claim shall be paid for any week during such period of ineligibilty until such determination has been reversed through the procedure for appeal provided herein and such reversal has become final."

Although the particular employer's account is not charged for an erroneous determination, funds once disbursed from the Fund are never recovered. Thus the Fund is permanently depleted if, because of the double affirmation clause, a claim is paid on an erroneous determination.

III.

THE QUESTIONS ON APPEAL

The questions presented by this appeal, as stated in the Notice of Appeal, are:

1. Do the plaintiffs as taxpayers and as contributors to the Oklahoma Unemployment Compensation Fund have a right to maintain this action to enjoin the Oklahoma Employment Security Commission from making unlawful and unconstitutional disbursements from the Fund?

2. Does the "double affirmation clause" (40 Okl. Stat. Supp. 1955 § 216(e) of the Oklahoma Employment Security Act violate the due process of law clause of the 14th Amendment to the Constitution of the United States in so far as it purports:

(a) To direct the payment of unemployment compensation benefits from the Oklahoma Unemployment Compensation Fund before a final determination is made as to whether or not the compensation claimants are lawfully entitled to receive the benefits, and

(b) To prohibit injunction, supersedeas, stay, or other writ or process of a court suspending the payment of such benefits pending judicial review after completion of the administrative proceedings awarding benefits?

3. Are the plaintiffs entitled to equitable injunctive relief to restrain the Oklahoma Employment Security Commission from making payment of unemployment compensation benefits from the Oklahoma Unemployment Compensation Fund before a final determination is made as to whether or not the compensation claimants are lawfully entitled to receive the benefits, there being no procedure (except in fraud cases) whereby benefits once paid can be recovered for the Fund in the event of a final judicial

determination that the administrative award of benefits was erroneous?

IV.

STATEMENT OF THE CASE

Simply stated, the question raised by the present case is:

Can unemployment compensation benefits constitutionally be paid from the Oklahoma Unemployment Compensation Fund before a final determination is made as to whether or not the compensation claimants are lawfully entitled to receive the benefits?

The District Court held that under Oklahoma law the plaintiffs (appellants) "have no property or litigable interest in the Oklahoma Unemployment Compensation Fund capable of constitutional protection" and dismissed the suit. Appellants will demonstrate that they do have a property right (and hence a litigable interest) in the Fund, that the unconstitutional invasion of the Fund deprives appellants of their property without due process of law in violation of the 14th Amendment, that (irrespective of the question of their property right in the Fund) as taxpayers they have a right under Oklahoma law to maintain this action, and that this is a proper cause for Federal equitable relief.

The particular compensation claimants are some 267 strikers. On November 29, 1955, they went on strike at

their place of employment, the Aero Design & Engineering Co. plant at Bethany, Oklahoma. They struck because contract negotiations between their union and their employer had not produced the contract which they wanted.

These strikers, after leaving their jobs, applied to the Oklahoma Employment Security Commission (hereinafter called Commission) for unemployment benefits. Their employer, Aero Design & Engineering Co., received notice of their applications for benefits and made timely protest, contending that the strikers were ineligible to receive benefits (by reason of 40 Okl. Stat. § 214, as interpreted in the second syllabus by the Court in *Board of Review* v. *Mid-Continent Petroleum Corporation*, 193 Okl. 36, 141 P. 2d 69[16]) and also that the strikers were disqualified from receiving benefits (by reason of 40 Okl. Stat. § 215 d[17]).

An administratvie hearing was held by an Appeal Tribunal referee of the Commission, who ruled that the strikers could receive unemployment benefits subsequent to January 1, 1956. Aero Design then appealed to the next administrative level, the Commission's Board of

16 "An individual who ceases work by reason of a labor dispute or strike against his employer is ineligible for benefits under the Oklahoma Unemployment Compensation Law of 1936, so long as he participates in such dispute and remains out of employment by reason thereof."

17 "An individual shall be disqualified for benefits * * * For any week with respect to which the Commission finds that his unemployment is due to a stoppage of work * * * because of a labor dispute * * *."

Review. The Board of Review modified and affirmed the referee's ruling and allowed benefits subsequent to February 12, 1956.

By statute [40 Okl. Stat. § 216 (d) (7)] an employer aggrieved by a Board of Review decision is allowed a "judicial review" by the state District Court. Aero Design at once petitioned for such judicial review. At this point Aero Design was confronted with the statutory provision which the present case concerns, the so-called "double affirmation clause", 40 Okl. Stat. Supp. 1955, § 216(e), set out above.

The double affirmation clause directs disbursement of unemployment benefits after two affirmative administrative awards (*i.e.* by the Appeal Tribunal referee and by the Board of Review) *notwithstanding the filing of a petition for judicial review.* It further expressly prohibits injunction, supersedeas, stay or other writ or process suspending the payment of benefits pending judicial review. Except in fraud cases, no procedure exists for the recovery, in the event of a subsequent judicial reversal of the administrative award, of benefits already disbursed. In other words, the money, once paid from the Fund, is gone forever, whether paid lawfully or unlawfully. The question of the claimants' lawful entitlement to the benefits becomes somewhat moot if under the double affirmation clause the benefits have already been paid before the question is judicially resolved.

When Aero Design petitioned for judicial review of the Board of Review decision it asked the District Court of Oklahoma County, Oklahoma, for a restraining order *pendente lite* to prevent disbursement of the benefits pending the judicial review. The basis upon which this was sought was the unconstitutionality of the double affirmation clause, as theretofore held by other state courts, including Michigan (*Chrysler Corporation* v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302, cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44), Indiana (*State ex rel. Campbell* v. *State*, 223 Ind. 59, 57 N. E. 2d 433), and Iowa (*Dallas Fuel Co.* v. *Horne*, 230 Iowa 1148, 300 N. W. 303), and thereafter by Pennsylvania (*Pennsylvania State Chamber of Commerce* v. *Torquato*, 125 A. 2d 755).

The District Court of Oklahoma County, Oklahoma, granted a temporary restraining order when the petition for judicial review was filed, and thereafter issued a restraining order *pendente lite* to prevent the disbursement of benefits before the hearing and ruling on the merits. The District Court then set the hearing on the merits two weeks hence, and assured prompt consideration of the case.

At that point the strikers applied to the Supreme Court of Oklahoma for a writ of prohibition to compel the District Judge to vacate the restraining order *pendente lite*. At the strikers' request, the Supreme Court notified

the District Judge not to proceed on the merits until the writ of prohibition was considered. (The strikers later requested that the hearing on the merits be abated pending the present action brought by Aero Design in Federal court. *Because of these requests by the strikers, the petition for judicial review is still pending on the merits. But for these requests by the strikers, the judicial review would have been completed in June, 1956.)*

The Supreme Court of Oklahoma issued the requested writ of prohibition to the District Judge, *Abraham* v. *Van Meter*, ... Okl. ....., 303 P. 2d 434, directing him to vacate the restraining order *pendente lite* and to desist from any further effort to prevent payment of unemployment benefits to the strikers. Aero Design was not made a party to the Supreme Court proceeding against the District Judge for writ of prohibition. Not being a party to the record, it believed that it could not appeal to the Supreme Court of the United States.

> *United States* v. *Jack*, 244 U. S. 397, 61 L. Ed. 1222, 37 S. Ct. 605;
> 54 Am. Jur. 835.

Nor could the District Judge appeal, for he had no personal interest in the case.

> *County Court* v. *State of West Virginia*, 208 U. S. 192, 52 L. Ed. 450, 28 S. Ct. 275;
>
> *Stewart* v. *City of Kansas City*, 239 U. S. 14, 60 L. Ed. 120, 36 S. Ct. 15;

Marshall v. *Dye*, 231 U. S. 250, 58 L. Ed. 206, 34 S. Ct. 92;
Caffrey v. *Territory of Oklahoma*, 177 U. S. 346, 44 L. Ed. 799, 20 S. Ct. 664.

Nor could the *amici curiae* appeal.

2 Am. Jur. 950.

Thus believing itself to be without any right of appeal to this Court from the Supreme Court of Oklahoma, Aero Design brought the present action in the United States District Court for the Western District of Oklahoma for a restraining order to prevent the disbursement of unemployment benefits pending the state court's ruling on the merits. A three-judge court was convened. The other appellants intervened as plaintiffs, being large employers and substantial contributors to the Oklahoma Unemployment Compensation Fund. This appeal is taken from an adverse ruling by that court.

In the present case the Commission contended that the Oklahoma Supreme Court decision in *Abraham* v. *Van Meter*, *supra*, was *res judicata*, saying that Aero Design could have appealed therefrom to the Supreme Court of the United States. The Federal court rejected this argument, yet commented that it was a "close question." To avoid the possible disposition of this appeal on the theory of *res judicata*, the appellants have taken a "precautionary" appeal to this Court from the Supreme Court of Oklahoma decision in *Abraham* v. *Van Meter* and this precautionary appeal is being filed concurrently with this

appeal (captioned: *A. P. Van Meter, et al.* v. *Jack D. Abraham et al.*)

V.

THE SUBSTANTIAL NATURE OF THE QUESTIONS PRESENTED

The Constitutional question raised by this appeal is doubly Federal in nature: (1) Appellants' alleged right to relief arises under the due process of law clause of the 14th Amendment and (2) the question involves the nation-wide unemployment compensation program which is sponsored by the Federal government. The precise Federal constitutional question has been answered differently by different state supreme courts, without any apparent justification for the 14th Amendment to be construed one way in some states and otherwise in others.

The Oklahoma Employment Security Act was enacted (as were the unemployment compensation acts of the 47 other states) pursuant to the Social Security Act of August 14, 1935. They are all part of the federally-sponsored social security program. The Federal government originally furnished model acts for consideration by state legislatures. The Social Security Act (42 U. S. C. § 503) prescribes mandatory standards to be met by the state statutes in order to qualify under the Federal program.

The so-called "double affirmation clause" appears in many if not most of the state acts, *but it is not required by the Social Security Act*. Nevertheless it constitutes a salient feature of the state acts. In most states the constitutionality of the double affirmation clauses has not yet been attacked.

As the District Court disposed of the case before reaching the merits, reference will first be made to the point upon which that court erred.

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1. Appellants' Right to Bring This Action.

Appellants contend that as substantial contributors thereto they have a property right in the Oklahoma Unemployment Compensation Fund. Other state courts have so held.

> *Chrysler Corporation* v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302, cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44.
>
> *Pennsylvania State Chamber of Commerce* v. *Torquato*, 125 A. 2d 755;
>
> *Carnegie-Illinois Steel Corporation* v. *Board of Review*, 117 Ind. App. 379, 72 N. E. 2d 662.

The District Court interpreted the Oklahoma decision of *Abraham* v. *Van Meter*, 303 P. 2d 434, as holding that in Oklahoma a contributor to the Fund has no litigable or property right therein and hence no standing to maintain this action. After so holding, the District

Court found no cause to consider the constitutional question presented. We submit that the District Court erred in its interpretation of the Oklahoma decision. Nowhere in the opinion in *Abraham* v. *Van Meter* did the Oklahoma Supreme Court deny that contributors have a property right in the Oklahoma Unemployment Compensation Fund. The Oklahoma Court could easily have chosen to base its decision on that point had it seen fit to do so, *but it did not*. Instead, it met the 14th Amendment question squarely, as demonstrated by the syllabus by the court:

> "The provision of the Oklahoma Employment Security Act [Tit. 40 O. S. 1951 § 216(e)] for payment of unemployment insurance benefits where the decision for such payment by an appeal tribunal of the Oklahoma Employment Security Commission is 'affirmed in any amount' by said Commission's Board of Review is not unconstitutional as in violation of Art. VII, Sec. 10, of the Oklahoma Constitution, or as denying 'due process' to the last employer of the claimants of such benefits, and other employer-contributors to the unemployment compensation fund, in violation of Art. II, Sec. 7 of said Constitution and the 14th Amendment of the U. S. Constitution."

And, in Oklahoma, it is the syllabus which states the law of the case.

Corbin v. *Wilkinson*, 175 Okl. 247, 52 P. 2d 45;

City of Altus v. *Martin*, ... Okl. ....., 268 P. 2d 228, 234;

12 Okl. Stat. § 977.

But the Supreme Court of Oklahoma is not the ultimate authority on interpreting the 14th Amendment.

From the quoted syllabus it is evident that the District Court incorrectly interpreted the Oklahoma decision *for if the Oklahoma Supreme Court had felt that Aero Design had no standing in court to protect the Fund, it could have so held, without having to decide the due process question. But, by deciding the due process question, the court recognized Aero Design's right to raise it.* Nothing in either the court's syllabus or opinion justifies the interpretation that a contributor to the Fund has no right to protect the fund from unlawful invasion. In fact, Oklahoma law is to the contrary. It is well settled that a taxpayer in Oklahoma has an "equitable ownership" of public funds and can maintain a suit to restrain their unlawful expenditure.

> *Vette* v. *Childers*, 102 Okl. 140, 228 P. 145.

The Oklahoma Employment Security Act is a taxing statute.

> *State* v. *Tulsa Flower Exchange*, 192 Okl. 293, 135 P. 2d 46.

Therefore appellants, as contributors to the Oklahoma Unemployment Compensation Fund, are taxpayers and can invoke the right of action recognized in *Vette* v. *Childers*, *supra*. We readily concede that as a matter of Oklahoma law the Oklahoma Supreme Court could overrule *Vette* v. *Childers* and *State* v. *Tulsa Flower Ex-*

change if it saw fit to do so. But it has not done so, and more specifically it did not do so in *Abraham* v. *Van Meter*, either directly or inferentially, nor is *Abraham* v. *Van Meter* in conflict with either *Vette* v. *Childers* or *State* v. *Tulsa Flower Exchange*. Therefore the latter two stand as the law of Oklahoma and must be recognized as such in Federal court.

Albertson v. *Millard*, 345 U. S. 242, 97 L. Ed. 983, 73 S. Ct. 600;

United States v. *Burnison*, 339 U. S. 87, 94 L. Ed. 675, 70 S. Ct. 503;

Oklahoma Tax Commission v. *Texas Company*, 336 U. S. 342, 93 L. Ed. 721, 69 S. Ct. 561;

Aero Mayflower Transit Co. v. *Board of Railroad Commissioners*, 332 U. S. 495, 92 L. Ed. 99, 68 S. Ct. 167.

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2. The various State Supreme Courts are in Conflict as to the Constitutionality of the "double affirmation clause."

In Michigan and Pennsylvania a double affirmation clause in an unemployment compensation law violates the due process of law clause of the 14th Amendment to the Federal Constitution, but in Oklahoma the same clause does *not* violate the 14th Amendment, according to the Supreme Court of Oklahoma. We submit that this conflict presents a substantial question to be resolved by this Court. The conflict is demonstrated by the following enumeration of the cases which have dealt with double affirmation clauses:

(1) *Chrysler Corporation* v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302, cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44, double affirmation clause held INVALID under due process of law clause of the 14th Amendment.

(2) *Dallas Fuel Co.* v. *Horne*, 230 Iowa 1148, 300 N. W. 303, double affirmation clause held INVALID as denying opportunity for full judicial review and thus violating governmental principle of division of powers.

(3) *State ex rel. Campbell* v. *State*, 223 Ind. 59, 57 N. E. 2d 433, double affirmation clause held INVALID, following *Chrysler* and *Horne cases*.

(4) *Pennsylvania State Chamber of Commerce* v. *Torquato*, 125 A. 2d 755, (petition for writ of cert. filed December 31, 1956, docket No. 669) double affirmation clause held INVALID under due process of law clause of the 14th Amendment.

(5) *Abelleira* v. *District Court of Appeal*, 17 Cal. 2d 280, 109 P. 2d 942, double affirmation clause enforced, apparently for lack of exhaustion of administrative remedies; not attacked on constitutional grounds.

(6) *State ex rel. Aikens* v. *Davis*, 131 W. Va. 40, 45 S. E. 2d 486, double affirmation clause held VALID, following above California decision.

(7) *Todd Shipyards Corp.* v. *Texas Employment Commission*, 245 S. W. 2d 371, double affirmation

clause attacked, but validity not determined because of procedural deficiency.

(8) *Abraham* v. *Van Meter*, ... Okl. ....., 303 P. 2d 434, double affirmation clause held VALID, following California decision.

The most direct conflict is shown by Oklahoma being on the one side, holding the 14th Amendment not to be violated, and Michigan and Pennsylvania holding that exact opposite.

Because of this conflict among the states, we submit that the question ought to be resolved by this Court, so as to enable uniform application of the 14th Amendment in all states.

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3. The Double Affirmation Clause Conflicts With This Court's Previous Interpretations Of The Due Process of Law Clause Of The 14th Amendment.

Although this Court has not passed upon the constitutionality of a double affirmation clause (having denied certiorari in *Chrysler Corporation* v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302, 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44) there are a number of decisions by this Court which announce the principles applicable to this case. We submit that adherence to these decisions requires invalidating the double affirmation clause, and that a substantial question thus exists by

the Oklahoma decision not being in accord with this Court's decisions.

It has been long recognized the due process of law requires the right to judicial review of administrative proceedings. 16 A. C. J. S. 873, 876.

Chicago, Milwaukee and St. Paul v. *State of Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462;

St. Joseph Stockyards Co. v. *United States*, 298 U. S. 38, 80 L. Ed. 1033, 56 S. Ct. 720;

Crowell v. *Benson*, 285 U. S. 22, 76 L. Ed. 598, 52 S. Ct. 285;

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

This rule of law pertains in Oklahoma.

Union Indemnity Co. v. *Saling*, 166 Okl. 133, 26 P. 2d 217, 221;

Associated Industries of Oklahoma v. *Industrial Welfare Commission*, 185 Okl. 177, 90 P. 2d 899, 7th paragraph of the syllabus by the Court.

Where an appeal from an administrative agency to a court is provided, but no provision is made for supersedeas, the lack of the right to supersedeas is a denial of due process.

Porter v. *Investors Syndicate*, 286 U. S. 461, 76 L. Ed. 1226, 52 S. Ct. 617;

Oklahoma Natural Gas Company v. *Russell*, 261 U. S. 290, 67 L. Ed. 659, 43 S. Ct. 353;

Pacific Telephone & Telegraph Company v. *Kuykendall*, 265 U. S. 196, 68 L. Ed. 975, 44 S. Ct. 553.

Applying the principles (1) that due process of law requires the right of judicial review of administrative decisions and (2) that where a right of appeal or judicial review exists the denial of the right to supersedeas is a denial of due process of law, it follows that in the Oklahoma Employment Security Act the permissive judicial review of administrative decisions (which is constitutionally mandatory) is lacking in due process of law because the right of supersedeas is denied by the double affirmation clause.

Chrysler Corporation v. *Appeal Board of Michigan*, 301 Mich. 351, 3 N. W. 2d 302; cert. denied 317 U. S. 635, 87 L. Ed. 512, 63 S. Ct. 44;

Pennsylvania State Chamber of Commerce v. *Torquato*, 125 A. 2d 755.

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4. Reasons Why The Question Presented Is So Substantial As To Require Plenary Consideration.

The decision by this Court of the basic Federal constitutional question—whether or not double affirmation clauses violate the due process of law clause of the 14th Amendment—will affect the unemployment compensation programs of a majority of the states.

The decision will necessarily overrule the highest court of one or more states, for the state court decisions are in direct conflict.

Appellants feel that any decision which is bound to overrule one or more state courts, especially on a Federal constitutional question, is of sufficient importance to justify plenary consideration by this Court, with briefs on the merits and oral argument.

Furthermore the basic question was not decided by the District Court, due to an erroneous understanding of Oklahoma law which led the District Court to dismiss the action before reaching the constitutional question. This is further reason for plenary consideration of the question by this Court, in order that the constitutional status of the double affirmation clause can be settled.

Respectfully submitted,

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FEBRUARY, 1957.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

Aero Design & Engineering Co., et al.	Plaintiffs.	Civil Action
v.		No. 7297
Oklahoma Employment Security Commission, et al.,	Defendants.	

JUDGMENT DISMISSING ACTION

On this 28th day of December, 1956, this cause comes on for disposition before the undersigned judges of this Court, the parties appearing by their counsel of record. In conformity with the views expressed in the Court's memorandum opinion filed herein on this date,

IT IS ADJUDGED AND DECREED that this action is dismissed.

Upon announcement by plaintiffs' counsel of their intention to appeal to the Supreme Court of the United States and upon their request for a further restraining order pending such appeal,

IT IS ORDERED that the restraining order entered herein on November 7, 1956, is continued in force and effect during the pendency of plaintiffs' appeal to the Supreme Court of the United States, provided that

plaintiffs prosecute such appeal with diligence and dispatch.

ALFRED P. MURRAH,
Circuit Judge
STEPHEN S. CHANDLER,
District Judge
ROSS RIZLEY,
District Judge

KES:S.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF OKLAHOMA

AERO DESIGN & ENGINEERING CO., et al., Plaintiffs.
v.
OKLAHOMA EMPLOYMENT SECURITY COMMISSION, et al., Defendants.

Civil Action No. 7297

Before MURRAH, Circuit Judge, CHANDLER and RIZLEY, District Judges

MEMORANDUM
(Murrah)

This suit challenges the constitutionality of the so-called double affirmation clause of the Oklahoma Employment Security Act. 40 O. S. A. § 211 *et seq.* The Act provides for the payment of certain stipulated benefits to unemployed persons under prescribed conditions from a fund created by contributions of Oklahoma employers (§217); creates an Employment Security Com-

mission [§220(a)]; authorizes commission determination of eligibility for benefits according to statutory standards (§§214 & 215); provides for administrative review of commission determination by appeal tribune [§216(d)]; and further administrative appeal to a board of review [§216(d)(3)] with the right of judicial review from the administrative decisions on questions of law. [§216(d)(7)]; provided, however, that "If a determination allowing benefits is affirmed in any amount by an appeal tribunal, or is so affirmed by the Board of Review, or if a decision of an appeal tribunal allowing benefits shall be promptly paid regardless of any further appeal, and no injunction, supersedeas, stay, or other writ or process suspending the payment of such benefits shall be issued by the Board or any court but if such decision is finally reversed no employer's account shall be charged with benefits as paid pursuant to the erroneous determination and benefits shall not be paid for any subsequent weeks of unemployment involved in such reversal." [§216(e)].

Three-judge federal equity jurisdiction is based upon the constitutional issue, the requisite amount in controversy and the prayer for injunctive relief against the payment of the benefits after double affirmation pending judicial review in the state court. 28 U. S. C. A. §§ 1131, 2281. The requisite amount in controversy is challenged, but the object of the suit is to restrain the

commission from disbursing approximately $25,000 from the unemployment compensation fund. The disbursements are to be made to numerous persons for sums far less than the jurisdictional amount. But it is the value of the object of the suit which determines the amount in controversy, not the value to the individual beneficiaries. Ronzio v. Denver & R. G. R. R., 116 F. 2d 604; Boesenberg v. Chicago Title & Trust Co., 128 F. 2d 245; Miller v. Nat'l. City Bank of New York, 147 F. 2d 798.

The facts pertinent to the constitutional issue are that the respondents here are former employees of the petitioner, Aero Design & Engineering Co., who have been awarded benefits under the Oklahoma Security Act after double affirmation under Section 216. Before disbursements of the benefits by the Commission, petitioner enjoined the payments by an injunction in the Oklahoma County District Court, apparently on the grounds that the payment of the benefits pending judicial review amounted to a deprivation of the petitioner's property without due process of law. In an original action in the Oklahoma Supreme Court for a writ of prohibition to the judge of the trial court issuing the injunction, the State Supreme Court specifically held that the payment of the benefits under Section 216(e) pending judicial review did not deprive the petitioner company or those similarly situated of their property without due process

of law. See Abraham v. Van Meter, 27 O. B. A. J. 1787, decided November 10, 1956, ... P. 2d .....

The decision of the Oklahoma court is interposed as *res judicata* on the issues presented here. The petitioner secured the injunction in the state District Court for its own benefit. It appeared in the Supreme Court as counsel for the respondent trial judge and participated in the litigation throughout. Some of the parties appearing *amicus curiae* here also appeared in the same capacity in the Supreme Court asserting the same interest as contributors to the Oklahoma unemployment compensation fund.

It is firmly established that "a judgment recovered in an action is *res judicata* or conclusive, as to the issues adjudicated therein, in favor of or against a person, who, though not an actual party to the record in that action, prosecuted the action or the defense thereto, on behalf of a party, or assisted the latter or participated with him in the prosecution of such action or its defense, if the same issue should be raised again in a subsequent action between him and the adversary of the party to whom his assistance was given or with whom he cooperated." See Annot. 139 A. L. R. 9, 12, following Caterpillar Tractor Co. v. International Harvester Co., 120 F. 2d 82, 139 A. L. R. 1.

The petitioner and those appearing *amicus curiae* were undoubtedly the real parties in interest in the litiga-

tion. The injunctive order was secured on their petition in their behalf and for their benefit. The trial judge was only a nominal party with no direct interest in the outcome of the litigation; as the real party in interest, the petitioner defended the extraordinary proceedings in the Supreme Court directed to the trial judge, participating at every step of the proceedings, and was undoubtedly bound by the decisions which dissolved the injunction and in effect ordered the payment of the benefits. At first blush, it would seem therefore that the state court proceedings are conclusive of the same issues presented here and we should not hesitate to apply the salutary doctrine intended to insure one full day in court, but no more. But here, a federal constitutional question is presented of which the Supreme Court of the United States is the final judge. A full day in court contemplates as a part of the judicial process a right to be heard in the court of last resort on the constitutional question. That right was not accorded or afforded in the state court proceedings for the simple reason that the state trial judge, being only a nominal party, had no right of appeal from the judgment of his superiors, and the petitioner here, not being a party to the record, was likewise denied a right of appeal. County Court v. State of West Virginia, 208 U. S. 192; United States v. Jack, 244 U. S. 397. It follows that the bar of *res judicata* usually applied in situations of this kind should be withheld.

The capacity or standing of the petitioner to maintain this suit is also challenged for lack of a litigable interest in the fund about to be disbursed. The contributions of the employers is said to create a public or *quasi* public fund for the benefit, which, while held for the account of the respective contributors, is maintained for the benefit of unemployed employees found entitled thereto: that the employer-contributors have no property right or interest in the fund, the deprivation of which would amount to a denial of due process of law. Of course the content or the nature of the employer-contributor's property interest in the fund is a matter of state law. But the question whether the deprivation or invasion of that state determined right amounts to a deprivation of due process of law prohibited by the Fourteenth Amendment is a question of federal law on which the federal decisions are controlling. Employer-contributors to the unemployment compensation funds under the provisions of uniform employment security acts have been held to be proper parties-plaintiff to contest the right of the commission to disburse unemployment benefits to former employees of employer-contributors pending judicial review of the administrative determination of the right to benefits in the states of Michigan, Indiana, Iowa and Pennsylvania. In Michigan and Pennsylvania, the capacity to maintain the suit on constitutional grounds was sustained as a contributor and therefore a

taxpayer and because the contributors' "own reserve account will be charged with the payment of any unemployment benefits that are made and its present contribution rate thereby jeopardized." Pennsylvania State Chamber of Commerce v. Torquato, 125 A. 2d 755. And see also Chrysler Corp. v. Appeal Board of Michigan Unemployment Compensation Commission, 3 N. W. 2d 302; State v. State, 57 N. E. 2d 433; Dallas Fuel Co. v. Horne, 300 N. W. 303. Those states also deny the constitutional power of the legislature to provide for the payment of the benefits pending judicial review and without supersedeas.

But, in the Abraham case, the Supreme Court of Oklahoma deliberately and specifically declined to accept the views of the courts which have sustained the employer's standing to sue and its constitutional right to supersedeas. In that case, the employers, including this petitioner, took the position that as employers and contributors to the unemployment compensation fund, they had a property right in it and an interest in seeing that it was used only for lawful purposes. The employer-contributors contended that inasmuch as the contribution rate of all employer-contributors to the fund was determined in a large measure by the prescribed state experience factor, and that such state experience factor was determined by the amount of benefits paid to employees, any increase in the benefits paid to such employees would

tend to increase the state experience factor with consequent increases in their rate of contribution to the fund.

There issuse were settled to the satisfaction of the Oklahoma court by the California case Abelleira v. District Court of Appeal, 109 P. 2d 942, 132 A. L. R. 715. In that case, the California court held that the comparable California unemployment insurance act "fulfills each requirement of due process of law." Drawing a distinction between the Chamber of Commerce case in Pennsylvania, where capacity to sue was sustained, and the Abelleira case in California, where it had apparently been denied, the Oklahoma Court quoted from the California case, which pointed out that in the event "that any payments of benefits are found to be erroneous, the particular employer's account shall not be charged with them. This being so, it is not clear how a contribution can be increased by the payments since the factors determining the rate is made inapplicable in such event." The Oklahoma Court was thus of the view that the similar provisions in the Oklahoma Act operated to deny the employer a litigable right in the disbursement of the fund pending judicial review. But it did not stop there. It went on to say that the unemployment insurance fund did not suffer any ultimate loss or depletion indiscriminately in all cases by reason of the payment pending judicial review, because of the recovery and recoupment provisions in the Act, wherein the Commission is em-

powered to recover or recoup losses judicially determined to have been erroneously paid. The Oklahoma court thought this was another demonstrable distinction between its case and the Pennsylvania case where it was conceded that if the unemployment benefits were made to the claimants, they would never be recovered, the insurance fund would be depleted to the extent thereof with irreparable harm unless a supersedeas or injunction was granted.

It thus becomes undeniably plain that under Oklahoma law, the employer-contributors to the compensation fund have no property right or interest in the fund, the deprivation of which would amount to a denial of due process of law. And this view finds support in Gange Lumber Co. v. Rowley, 326 U. S. 295, where the Court held that employer-contributors to an industrial accident fund under Washington's Industrial Insurance Act, based upon individual and class experience cost factors had no vested interest in such fund which would entitle them to assert a constitutional right therein. Specifically, the Court did not think that the prospective increases in the contributions based upon increased cost factors was the proper subject of protection under the due process clause of the Fourteenth Amendment.

In view of the Oklahoma law, we are constrained to hold that the petitioners have no property or litigable interest in the Oklahoma unemployment compensation

fund capable of constitutional protection, and the suit is dismissed.
